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No. 81-2159

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

BILL M. SILKWOOD, Administrator of the Estate of KAREN G. SILKWOOD, Deceased,
Appellant,

v.

KERR-McGEE CORPORATION and KERR-McGEE NUCLEAR CORPORATION,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF THE NATIONAL WOMEN'S HEALTH NETWORK AS AMICUS CURIAE

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April 27, 1983

QUESTION PRESENTED

Whether the federal Atomic Energy Act preempts the application of a state punitive damages law, which punishes people who recklessly inflict injury on others, where the injury was caused by the release of plutonium from a federally regulated nuclear facility.

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MOTION FOR LEAVE TO FILE BRIEF OF THE NATIONAL WOMEN'S HEALTH NETWORK AS AMICUS CURIAE

The National Women's Health Network hereby moves this Court for leave to file the accompanying brief amicus curiae urging the Court to reverse the decision below. It is the position of amicus that

the Oklahoma punitive damages law seeks to deter tortious conduct committed with malice, oppression or fraud and is thus not preempted by the Atomic Energy Act, which regulates the use of nuclear materials unrelated to tortious conduct or the state of mind of the regulated user.

INTEREST OF AMICUS CURIAE

The National Women's Health Network (NWHN) is a non-profit organization, formed in 1975, and serves as the only national public interest organization devoted exclusively to women and health. Its objectives include changing the structure and character of our health care system to better meet the needs of consumers and health care workers, and addressing the abuses and inadequacies of

the present system. NWHN's 12,000 individual and 300 group members represent a constituency of almost half a million people.

NWHN is a broad-based women's health care organization whose interests will be affected by the disposition of the present proceeding. NWHN has a significant interest in ensuring that its members and the society at large are not harmed intentionally, maliciously or with reckless disregard for their well being by anyone, whether that person is federally regulated or not.

NWHN, in its attempt to effectuate its goals, finds it desirable, and often necessary, to take positions on either legislation or judicial decisions that have a significant effect on women's health. NWHN believes that the Court of

Appeals decision below, Silkwood v. Kerr-McGee, 667 F.2d 908 (10th Cir. 1981) has such an effect on women's health by preventing a state from punishing those whose harmful acts are committed with malice or reckless disregard for the safety of others and thus eliminating an important deterrent to malicious or reckless conduct. The mere existence of federal regulation of an industry should not by implication preempt state laws which punish all persons, including a regulated industry, where its reckless actions cause significant harm.

NHWN supports Appellant's position that the Atomic Energy Act does not preempt the Oklahoma punitive damages statute. The two laws were not intended to control the same activity, and do not conflict in their application. NHWN urges

this Court to reverse the Court of Appeals decision and reinstate the punitive damages awarded by the jury and approved by the District Court.

NWHN has sought the consent of the parties to the filing of this brief, but was only able to secure permission of Appellant.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

The interest of amicus is set out in the accompanying motion for leave to file this brief amicus curiae.

STATEMENT OF THE CASE

The representative of the estate of Karen Silkwood brought this tort action for injury suffered by Karen Silkwood, a worker at defendant's federally-regulated nuclear facility, as a result of her exposure to radiation from plutonium found in her apartment. The jury in this diversity suit found defendant's conduct reckless,[1] and awarded in addition to $505 thousand actual damages for personal and property injuries, $10 million in punitive damages. The District Court upheld the actual and punitive damages

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[1] The word "reckless" as used throughout this brief encompasses the concepts of wanton disregard of another's rights or such gross negligence that malice or evil intent will be inferred, as provided by jury instruction No. 19 at trial. Silkwood v. Kerr-McGee, 485 F.Supp. 566, 603 (W.D. Okla. 1979).

awards. Silkwood v. Kerr-McGee Corp., 485 F. Supp. at 590-91. Chief Judge Theis rejected the claim that the federal preemption doctrine precluded award of common law tort remedies for injuries caused by exposure to radiation.

Defendant appealed, claiming inter alia, that the Federal Atomic Energy Act, which established a federal mechanism for developing, utilizing and controlling atomic energy, preempts the Oklahoma punitive damages statute. The District Court decision was reversed in part by the Tenth Circuit, with Judge Doyle dissenting.[2] Silkwood v. Kerr-McGee, 667

[2] The Court of Appeals also struck down the $500 thousand personal injury award holding that Karen Silkwood's injuries were job related, thus invoking the sole remedy of worker's compensation. Silkwood v. Kerr-McGee, 667 P.2d at 918.

F.2d 908, 922-23 (10th Cir. 1981). Rehearing, and rehearing en banc were denied on February 19, 1982. Appellant's Jurisdictional Statement was filed on May 20, 1982.

The Oklahoma statute allows punitive damages "for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud or malice, actual or presumed...." 23 Okla. Stat. § 9 (1971).

The Atomic Energy Act regulates the use of nuclear power by issuance of licenses and permits, subject to particular regulations. The regulation of relevance here controls the quantity of plutonium which can be released from a nuclear facility. 10 C.F.R. § 20 (1982). The Atomic Energy Act also establishes a

system of federal insurance to provide funds to persons who are injured as the result of the operation of nuclear facilities and who recover judgments under state tort law. (Price-Anderson Act (42 U.S.C. § 2210)).

SUMMARY OF THE ARGUMENT

Since 1954 when Congress enacted the Atomic Energy Act, it has had occasion to amend the statute and related statutes several times. In the original Act, and through many of these amendments, Congress has re-emphasized that states retain important rights even though the exercise of these rights may impact upon the development of nuclear power. Only recently, this Court held that the Congressional decision to preempt state

law expressed in the Atomic Energy Act should be narrowly limited to those state laws which have nuclear safety as their purpose. In 1957, when Congress adopted a federal system to provide insurance to cover claims arising from public exposure to radiation, it went out of its way to preserve state common law and statutory tort liability. Even when the courts held that states could not directly and more stringently regulate air emission of radiation from nuclear plants, Congress quickly amended the law to restore the state's right.

It is against this strong history of protecting traditional state interests that this Court should now examine the decision of the court below. That court held that the Oklahoma statute allowing

punitive damages is preempted by the Atomic Energy Act. In effect, the court concluded that a company which is regulated by the Nuclear Regulatory Commission, and which commits a tort in such a manner that it constitutes reckless disregard of the welfare of others, is immune from imposition of punitive damages for its conduct if it happens to commit the tort by exposing the plaintiff to radiation.

It is apparent that because the Oklahoma law seeks to punish and deter a tortfeasor's particular state of mind, and the Atomic Energy Act seeks to regulate the use of nuclear material to protect the public health and safety, that the two laws regulate entirely different conduct, and do not conflict or

even compete with each other. For these reasons, preemption is totally inappropriate.

ARGUMENT

THE OKLAHOMA PUNITIVE DAMAGES STATUTE NEITHER CONFLICTS WITH THE ATOMIC ENERGY ACT NOR HAS CONGRESS EXPRESSED AN INTENT THAT IT BE PREEMPTED BY THE ACT.

A. The Oklahoma Punitive Damages Statute And The Atomic Energy Act Do Not Regulate The Same Conduct And Thus A Preemption Issue Is Not Presented.

Preemption analysis is not applicable in this case. As a matter of common sense, there is not a basis for embarking upon a preemption analysis unless there are two laws, one federal and one state, which regulate the same conduct. Here, that is not the case.

In this case, the only federal law at issue involves the regulation of the emission of plutonium from defendant's nuclear power plant. The Nuclear Regulatory Commission has adopted regulations establishing the limits for releases of plutonium by defendant and others, and imposes punishment on those who violate the regulation. The Oklahoma statute punishes a defendant for committing a tort (irrespective of whether the action does or does not comply with federal regulations) with the state of mind characterized as "oppressive, fraudulent or malicious." In short, "the matter on which [Oklahoma] asserts the

right to act" is not "in any way regulated by the federal government." Rice v. Santa Fe Elevator Corp., 313 U.S. 218, 236 (1947).

An examination of the purposes of the two statutes will further illustrate the distinction between the activities which the statutes regulate.

The regulatory purpose of the Atomic Energy Act is to assure that nuclear power is developed "to the maximum extent consistent with the common defense and security and with the health and safety of the public." 42 U.S.C. § 2013(b).

The purpose of the Oklahoma statute is to punish, and thereby deter, tortfeasors for the reckless manner in which they inflict harm on innocent people. Dayton Hudson Corp. v. Amer. Mutual Liab.

Ins. Co., 621 P.2d 1155, 1158 (Okla. 1980); see also Oller v. Hicks, 441 P.2d 356, 360 (Okla. 1967); Cox v. Theus, 569 P.2d 447 (Okla. 1977); Walton v. Bennett, 376 P.2d 240, 243 (Okla. 1962). It is the improper state of mind in the commission of a tort which controls the award of punitive damages. Dayton Hudson Corp. v. Amer. Mutual Liab. Ins. Co., 621 P.2d at 1158-59.

In addition, the elements required to establish a violation of the federal and state statutes are quite different.

Under the federal statute, if a licensee fails to comply with the NRC regulations it is liable, regardless of negligence or the licensee's state of mind. 42 U.S.C. § 2282. In contrast, under the Oklahoma statute, there is a

two step process. First, the court determines whether defendant has wronged plaintiff, and second, the court evaluates whether punitive damages are appropriate by examining the state of mind of the defendant when committing the tort. Cox v. Theus, 569 P.2d at 449-50. In this case, not only did the jury have to decide whether plutonium was an ultrahazardous substance, whether it originated in the Kerr-McGee facility, and whether Karen Silkwood's property or person were injured by it away from the worksite (all of which were required to establish that an actionable tort had been committed), but in addition, the jury had to decide whether Kerr-McGee's conduct was oppressive, fraudulent or malicious.

Because the federal and state statutes regulate different conduct, as evidenced by their entirely different purposes and the different elements required to establish a violation, preemption is inappropriate in this case.

B. The Oklahoma Punitive Damages Statute Does Not Satisfy The Prerequisites For Preemption Based On This Court's Preemption Analysis.

Fundamental to preemption analysis is an effort by courts to discern the intent of Congress in enacting the federal statute at issue. Because that is often a difficult task, this Court has taken great strides to avoid preemption

of state law whenever possible.[3] In its most recent decisions on preemption, this Court emphasized the intent and purpose of Congress in enacting federal legislation, and established minimum points of contact between federal and state statutes which must exist before a question of possible preemption arises. Pacific Gas and Elec. v. Energy Res. Comm'n., No. 81-1945, slip op. at 11 (April 20, 1983); Fidelity Federal Sav. & Loan Ass'n. v. De La Cuesta, 102 S.Ct. 3014 (1982). In the present case, these threshold points of contact do not exist.

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[3] See Merrill Lynch, Pierce, Fenner and Smith, Inc. v. Ware, 414 U.S. 117, 127 (1973); Florida Lime and Avocado Growers v. Paul, 373 U.S. 132, 142 (1963); San Diego Unions v. Garmon, 359 U.S. 236, 243-47 (1959).

The most obvious contact point, and the one where this Court has had no problem finding preemption, is where the intent of Congress, as expressed in the language of the federal statute, forbids state regulation of a certain type, or expressly requires that federal regulation be exclusive and the state statute in fact attempts the prohibited regulation. Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977). It is clear that such express preemptive language is not present in this case.

A second contact point exists when the relationship between a federal and state statute is such that compliance with both is a physical impossibility. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. at 142-43. This contact

point does not exist between the federal and state statutes at issue, because Kerr-McGee can comply with federal regulatory standards, and also avoid reckless conduct.

A third contact point is present when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941). This contact point is missing in this case, because there is no federal objective that the Oklahoma law frustrates. As already noted, the federal law establishes a program to develop nuclear power consistent with the defense of this country and the health and safety of its citizens. The Oklahoma law punishes those whose tortious conduct

may impact on the health and safety of others, but only if those tortfeasors have an improper state of mind.

The Court of Appeals, in a strained attempt to apply this third contact point to this case, asserted that the Oklahoma law stands as an obstacle to the "full purposes and objectives" of Congress in the Atomic Energy Act. That alleged obstacle does not exist.

First, the lower court created a new test for preemption -- i.e. that federal and state law "compete substantially" --and found such improper competition between the laws at issue here. Even assuming that "competing substantially" was a proper preemption test, the statutes at issue here do not meet it. As previously stated, the two statutes

regulate totally different conduct, and thus do not compete. The lower court's analysis was in error.

Second, the lower court found that a primary purpose of the Atomic Energy Act was the promotion of nuclear power, and thus any state statute which would tend to hinder that purpose should be pre-empted. In a recent decision, however, this Court held that the Congressional interest in promoting nuclear power is neither single-minded nor sufficient in itself to preempt state law. Pacific Gas and Elec. v. Energy Res. Comm'n., No. 81-1945, slip op. (April 20, 1983). In fact, unlike the present case, in Pacific Gas and Elec., the California statute directly halted all further nuclear power development in California, and yet this

Court concluded "Congress has left sufficient authority in the states to allow the development of nuclear power to be slowed or even stopped for economic reasons." Pacific Gas and Elec. v. Energy Res. Comm'n., No. 81-1945, slip op. at 30 (April 20, 1983). Surely Congress has left sufficient authority in the states to punish those whose tortious conduct is committed with reckless disregard, and who happen to commit their tort by the use of radiation.

The fourth contact point which, if present, warrants a preemption analysis is where "[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where Congress touched a field in

which the "federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject...." Rice v. Sante Fe Elevator Corp., 331 U.S. at 230.

This contact point is lacking as well in this case, because the statute is far from a comprehensive federal regulation of, and does not reflect a dominant federal interest in, all aspects of nuclear power. Quite the contrary. Congress specifically preserved traditional state functions in a number of areas.

(1) Congress left state common law tort liability intact when it adopted the

Price-Anderson Act[4] 42 U.S.C. § 2210, which requires nuclear facilities to carry insurance to pay damages for tort liabilities arising under state law.

(2) The Act preserves all state laws which regulate activity of nuclear facilities "for purposes other than protection against radiation hazards." 42 U.S.C. § 2021(k). This Court made this point clear in a recent decision

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[4] For torts such as the one involved here, Congress intended that the tort should "remain subject to the traditional rules of tort law", H.R. Rep. No. 2043, 89th Cong., 2d Sess. 11 (1966) -- i.e. to the rules of tort that prevailed before adoption of the Price-Anderson Act. In Duke Power v. Carolina Environmental Study Group, 438 U.S. 59 (1978) this Court recognized that prior to enactment of that Act, persons claiming radiation injuries retained the "right ... to utilize their existing common law and state law remedies to vindicate any particular harm visited upon them from whatever sources." Id. at 88-89 n.33.

which held that a state law which regulates nuclear power plants for economic reasons, a purpose "other than protection against radiation hazards" is not preempted. Pacific Gas and Elec. Co. v. Energy Res. Comm'n., No. 81-1945, slip op. at 6-7.

(3) The legislative history of the Act indicates that the Atomic Energy Act was interim legislation, the first step in the process of turning over extensive regulatory responsibility to the states.[5]

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[5] The Senate Report accompanying the bill contains a section-by-section analysis that even gives an estimate as to how long section 2021 should remain in effect before new legislation would be needed. The report explained:

> The purpose ... also provides for coordination of the development of radiation standards for the guidance of Federal agencies and cooperation with states, and recog-

S. Rep. No. 870, 86th Cong., 1st Sess. 12 (1959).

(4) Congress created a scheme whereby states could be delegated certain regulatory functions of the Nuclear Regulatory Commission when the governor "certifies that the state has a program for the control of radiation hazards" and when the Commission finds "that the State Program is compatible with the Commission's program for the regulation of such materials." 42 U.S.C. § 2021(d).

> nizes that this is interim legislation in that, as the states improve their capabilities, additional legislation may be needed, perhaps in approximately 5 years. (Emphasis added).
>
> S. Rep. No. 870, 86th Cong., 1st Sess. 12 (1959).

(5) Congress empowered states to impose regulations more stringent than NRC regulations with respect to air emissions of radioactivity in the Clean Air Act Amendments of 1977. 42 U.S.C. § 7422 (Supp. III 1979). It is important to note that in the only instance in which a court in a final order ruled that the Atomic Energy Act preempts a state regulation controlling the level of releases from a nuclear facility,[6]

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6 Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th Cir. 1981), aff'd. mem., 405 U.S. 1035 (1972). Because this Court merely affirmed without opinion the Eighth Circuit's decision, it has not endorsed the reasoning of the Court and the decision has less precedential weight than when this Court accords a full review. Pacific Gas and Elec. v. Energy Res. Comm'n., No. 81-1945, slip op. at 19 n.24.

Congress explicitly overruled that decision.

As this Court recently held in Pacific Gas and Elec. Co. v. Energy Res. Comm'n., No. 81-1945, slip op. (April 20, 1983), the scope of preemption under the Atomic Energy Act is narrowly circumscribed and does not sweep away great areas of traditional state authority, e.g., economic regulation of nuclear utilities. The Atomic Energy Act does not preempt any traditional state functions absent explicit preemptive language, even where the state functions directly impact on nuclear facilities and spring from a consideration of factors uniquely nuclear.

Thus, when the facts of this case are analyzed in light of the traditional starting points for preemption analysis established by this Court, no point of contact is found between the Atomic Energy Act and the Oklahoma punitive damages statute. It was inappropriate for the Court of Appeals to find preemption.

CONCLUSION

Oklahoma, like many states, protects its citizens from reckless infliction of harm by the imposition of punitive damages when such conduct causes injury. Preventing harm through the application of common law principles, including punitive damages, is an important part of what a state does. To deprive the state

of the availability of such vital protection for the health and safety of its citizens by operation of the pre-emption doctrine, requires clear and explicit legislative language or intent. Neither are present here.

Nothing in the Oklahoma law does or can interfere with the lawful and proper regulation of the production and use of nuclear material. The Court of Appeals decision that this Oklahoma law is impliedly preempted by federal statute should be overruled.

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